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A BAD ALABAMA DECISION IN REGARD TO THE RIGHT TO RESCIND A CONTRACT.

In the case of Rock Island Sash & Door Works v. Moore & Handly Hardware Co. (Ala.), 41 So. Rep. 806, we have an illustration of a method of handling the question of the right to rescind a contract which is divided up into installments where there has been a failure of one of the parties with regard to one of the installments. The court said, p. 808: "The goods were to be delivered in installments and the price was proportioned to and payable on the several installments. The order was for one car, with the privilege of three. The option to take belonged to the purchaser. The failure or refusal of the purchaser to take the first car did not furnish the plaintiff with the right to abrogate the entire contract. It would have had its remedy against the defendant for damages for any failure or refusal on the part of the defendant to accept the first car. In other words, the defendant could not have escaped liability for a breach of a contract growing out of a failure on their part to furnish specifications on the first car within the time limit."

The conclusion reached in this case is based upon the idea that a contract which is to be performed by deliveries in installments, at stated periods, to be paid for upon the delivery of each installment is severable, and the failure as to one of the installments by either party, as a question of law, does not give the right to the injured party to rescind because he may have his remedy upon the installment which has failed of performance. The court says: "As is said in Johnson v. Allen, 78 Ala. 391, 56 Am. Rep. 34, 'each delivery is considered in the nature of a separate and distinct contract.' In Rugg v. Moore (Pa.), 1 Atl. Rep. 320, it is held that an agreement for the sale of six loads of corn, deliverable at different times and payable at a price per bushel on delivery, is a severable contract." All of which goes to the effect that the question is regarded as one of law by the Alabama court. Yet it holds in this same case that, "where there are two written contracts, it is competent to show by parol evidence that they relate to one and the same transaction and const tute one contract, without offending the rule against varying a written contract by parol evidence." We agree with the court upon this latter proposition. It seems to us that there is no excuse for any court not to be fully posted with regard to the law upon this subject as decided by the leading cases. Our common law is based upon the accumulated wisdom of the ages; this being so the courts should be posted wi h regard to the history of the law. The leading case upon this subject by the Supreme Court of the United States, is that of Norrington v. Wright, 115 U. S. 188, where the proper method of considering such questions is shown. Here the Supreme Court of the United States goes into the history of this class of cases and concludes that the case of the Mersey Steel & Iron Co. v. Naylor, 9 H. L. App. Ct. 438, may be deemed to have settled the matter. This case was based upon the opinion in Freeth v. Burr, 9 L. R. 208, which holds that whether there has been a renunciation of the contract by the defendant is a question of fact by the consideration of the nature of the breach and the circumstances under which it was made. In Corbin's Edition to Benjamin on Sales, sec. 908, the author says: "The rule is firmly established whether the acts and conduct of one party evince an intention to abandon and be n> longer bound by the contract, and that is a question of evidence." He also says: "This rule was finally established in the house of lords, in the case of Mersey Steel & Iron Co. v. Naylor, *supra*, and that it is submitted that this decision must be taken to settle the law, is no longer doubted in this country."

In the case of Norrington v. Wright, *supra*, the contract was for 50,000 tons of old T iron rails for shipment from European ports at the rate of 1,000 tons per mon h, whole shipment to be made inside of six months; settlement, cash on presentation of bills. It was there held that the shipment of 400 tons the first month and 884 the second, was the ground for rescission. The court followed the English decisions holding that the question was one of fact to be determined by the nature of the contract. The effect of a failure to pay an installment and all the circumstances were admissible to determine whether or not the

party committing the wrong had evinced an intention not to be further bound by the terms of the contract. In Mersey Steel & Iron Co. v. Naylor, *supra*, the court held that the breach in that case of a failure to pay an installment when it became due was not of itself sufficient to warrant a rescission, because there had been no manifest intention not to be further bound by the terms of the contract; that the question, however, is one of evidence. In the case of Withers v. Reynolds, 2 B. & Ad. 882, there was a contract for the delivery of several loads of straw, each to be paid for on delivery. After a part of the straw had been delivered, the party making the delivery said to the other, "I am going to hold one bundle in hand till you deliver the next, so as to have a check on you." It was properly held that the contract was for payment upon delivery and the refusal to pay upon delivery, of one installment, gave the right to regard the whole contract as abandoned, consequently the right to rescind, since it was proposed by the other party that he would not pay for any installment upon delivery, but would keep one in hand and pay when the next was delivered. As a general rule the mere failure to pay for an installment when it becomes due is not sufficient in itself to entitle a party injured to rescind an agreement, but whether or not he may do so, is a question of evidence pure and simple, and may not, as in the principal case, be determined as a question of law, unless the terms of the contract are such as to leave no doubt upon the subject. If evidence may be introduced to show that one of two written contracts was so dependent upon the other that they must be regarded as one contract, the question is also one of evidence whether a breach goes only to part, or the whole consideration.

NOTES OF IMPORTANT DECISIONS.

NUISANCE—NOTICE TO ABATE A NUISANCE NOT NECESSARY IN A CRIMINAL PROSECUTION.—In the case of State v. Lehigh & H. R. R. Co. (N. J.), it seems that a railroad acquired a bridge from another road which it had constructed across a public highway above the grade thereof, carrying the tracks over the same upon the bridge, the abutments and the retaining walls thereby encroaching upon the highway. It operated and maintained the same after its acquisition from such company. The court said in part upon the point: "The only ground of attack upon the conviction is that no proof was offered by the state that any notice had been given to the defendant company, before the indictment was found, by the public authorities having charge of the highway to remove these obstructions therefrom, the contention being that the company was not chargeable with maintaining a nuisance until it received such notice; and the decisions of this court in Pierson v. Glean, 14 N. J. Law, 36, 25 Am. Dec. 497; Beavers v. Trimmers, 25 N. J. Law, 97, and Morris Canal & Banking Co. v. Ryerson. 27 N. J. Law, 457, are appealed to in support of this contention. All of these cases were civil actions. That which was first decided (Pierson v. Glean), maintains the principle that a purchaser of land upon which there has been erected by a prior owner a structure which is a nuisance to an adjoining land owner is not liable to damages for the continuance of such nuisance before a request to abate it. But the later cases of Beavers v. Trimmer and Morris Canal & Banking Co. v. Ryerson declare that this principle applies only when the purchaser simply suffers the structure to remain upon the land without using it, and hold that when the purchaser maintains and uses the structure he continues the nuisance, and that the party injured has a remedy against him without requesting an abatement thereof. In the later case of Meyer v. Harris, 61 N. J. Law, 100, 38 Atl. Rep. 690, this limitation of the principle of Pierson v. Glean was reiterated. Whether the principle of Pierson v. Glean, as modified by the later decisions, is applicable in a criminal proceeding may well be doubted; but as, on the facts proved, the plaintiff in error would have been liable even in a civil action without notice to abate, the case does not call for a consideration of that question."

DELAYED TELEGRAPH MESSAGES—MENTAL ANGUISH.

In the edition of the CENTRAL LAW JOURNAL of May 25, 1906, appeared an editorial vigorously approving the decisions of those courts that have held that the addressee of a telegraph message may recover damages for mental anguish suffered by reason of the negligent delay of the message. The writer agrees with the editor that the delay of "social messages," that is messages in regard to death or serious illness, is a "burning shame" and ought not to go unpunished. But is the remedy approved by the editor the most expedient remedy? And can it be reconciled with the established principles of the law?

The editorial is open to three criticisms: First, the general one, that it approves a remedy unprecedented and inexpedient; sec-

ond, that it assumes, erroneously, that the sole basis for those decisions which deny a recovery of damages in this class of actions is that mental suffering is "an element too uncertain for proper measurement" in damages; third, that it makes the seemingly unwarranted prediction that the mental anguish doctrine will become the law generally.

Taking up these criticisms in inverse order, a careful examination of the authorities on the subject leads one rather to the conclusion that the mental anguish doctrine is not meeting with approval, but with disapproval generally, in the various courts of last resort in which the question has been passed upon within late years. In those states, moreover, in which the doctrine has been established, there are many evidences of dissatisfaction with the doctrine and a growing tendency to confine it strictly to those cases to which it has already been applied, and to hedge it with various restrictions. It is well to bear in mind in the onset that the question under consideration is the right of the addressee of a "social message," in the absence of statute, to recover damages for mental anguish, where the sole basis for the recovery is the negligence of the company and the mental suffering occasioned thereby. The editorial mentions four states in which damages in such cases may be recovered: North Carolina, Alabama, Texas and Kentucky. To this number may be added five more states: Tennessee, Iowa, Louisiana, South Carolina and Arkansas. North Carolina adopted the mental anguish doctrine in 1890 in the case of Young v. Telegraph Co.[1] Since that time the supreme court of that state has not handed down an opinion in which the question has been considered on principle, but has merely followed without discussion the established precedent. In the North Carolina case which occasioned the editorial,[2] the doctrine is not discussed, but merely accepted as the established law of the state. In Alabama the right of recovery for mental anguish is confined to one who has a right to sue and recover at least nominal damages for the breach of the contract of transmission, the court holding that mental anguish alone is not sufficient basis for a cause of action, but that when one has once the right to sue for the breach of the contract, he may prove his mental suffering to make up the *quantum* of the damages.[3] Alabama, then, is not in line with North Carolina, Texas and Kentucky. Even under the Alabama law the right to recover is restricted to cases in which the parties interested bear the relation of parent and child, husband and wife, brother and sister.[4] Texas was the first state to adopt the mental anguish doctrine[5] and is its chief exponent. Mental anguish cases flourish in Texas. The reports are full of them To attempt to reconcile the decisions of the supreme court as to the various restrictions and limitations placed upon the right to recover is a well-nigh hopeless task. Kentucky adopted the mental anguish doctrine in 1890.[6] The judges of the court of last resort in the state, who have delivered the opinions upon this question within recent years, are very evidently chafing under the precedent by which they are bound, and it would not be surprising if the court should at an early date break away from the Chapman case and deny the right to recover damages for mental anguish. In Denham v. Telegraph Co.,[7] a case in which recovery for mental anguish was denied because the relationship between the parties, being that of aunt and nephew, was not close enough, Paynter, J., in delivering the opinion of the court, says: "Since the Chapman case this court has been committed to the doctrine that an action will lie against telegraph companies in damages for mental suffering caused by its failure to deliver special messages, by reason of which the sender or person addressed is prevented from attending at the bedside at the death of, or at the funeral of a near relative. The court has allowed recoveries only to those of the first degree of relationship. * * * There are many breaches of contracts that occasion mental suffering, but no action in damages will lie therefor." See other Kentucky cases cited in foot note showing dissatisfaction with, and restrictions on the mental anguish doctrine.[8]

[1] 107 N. Car. 307, 22 Am. St. Rep. 883.
[2] Hamrick v. Tel. Co., 52 S. E. Rep. 252.
[3] Western Union Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148; Western Union Tel. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23; Blount v. Tel. Co. (Ala.), 27 So. Rep. 779; Western Union Tel. Co. v. Crocker, 135 Ala. 492, 33 So. Rep. 45.
[4] Western Union Tel. Co. v. Ayres, 131 Ala. 391, 90 Am. St. Rep. 92.
[5] So Relle v. Tel. Co., 55 Tex. 308, 40 Am. St. Rep. 805, decided 1881.
[6] Chapman v. Tel. Co., 90 Ky. 265, 13 S. W. Rep. 880.
[7] (Ky.), 87 S. W. Rep. 788.
[8] Robinson v. Tel. Co. (Ky.), 68 S. W. Rep. 656, 57

In Wadsworth v. Telegraph Co.,[9] the Tennessee court, in 1888, allowed recovery of damages for mental anguish, but the decision was based, as have been those that have followed it, upon the construction of a statute providing that telegraph companies shall be liable in damages to the party aggrieved by their negligence. The Tennessee court, then, has not adopted the extreme Texas position. Even under this statute the right to recover is narrowly restricted. To quote from a late case:[10] "This court has held that parties injured could recover damages for mental anguish and grief sustained by them in being denied the privilege of attending to the bedside of near relatives during their last hours, of superintending the preparation of their bodies for interment and of being present at their burial, but in no other cases. The rule upon which damages are allowed is of difficult application, and its policy and soundness has been questioned in many courts of high authority, and we do not deem it proper to extend it to other cases than those to which it has already been applied in this state. This also seems to be the tendency of other courts of last resort in states where the mental anguish doctrine prevails." Iowa adopted the mental anguish doctrine in a carefully considered case decided in 1895,[11] and reiterated and reaffirmed the doctrine in another well-considered opinion of recent date,[12] so that Iowa takes its place with Texas, North Carolina and Kentucky as a full advocate of the mental anguish doctrine. The Louisiana court in 1903 allowed recovery for mental anguish,[13] but since the decision was based almost entirely upon the civil law, it can be of little value as an authority in the other states. In South Carolina and Arkansas, statutes are in force expressly providing for recovery of damages in this class of cases.[14] Before these statutes were enacted the courts of each of the two states had, in learned opinions, refused to adopt the mental anguish doctrine.[15]

It is then to be noted that North Carolina, Texas, Iowa and Kentucky, four states, are the only states in which the mental anguish doctrine has been adopted fully by the courts, and even in these four states the doctrine is confined to a very small class of cases and hedged about by numerous restrictions. With the exception of Iowa, there has not been a single convert among the states to the mental anguish doctrine since the year 1890. On the other hand, the doctrine, since that time, has been directly repudiated in well considered cases by the highest courts of fourteen states and by the federal courts.[16] To this number may be added South Dakota and Illinois, which took their places against the mental anguish doctrine prior to 1890,[17] and Alabama, which rightfully belongs among those states which oppose the mental anguish, because holding that mental anguish alone will not support an action.[18] Thus we have opposed to the mental anguish doctrine the highest courts of seventeen states and the federal courts as against the highest courts of four of the states in favor of the doctrine. Formerly Indiana, by virtue of the case of Reese v. Telegraph Co.,[19] was among those states favoring the mental anguish doctrine, but the Indiana court, in the case of Fergu-

L. R. A. 611; Davidson v. Tel. Co. (Ky.), 54 S. W. Rep. 830; Western Union Tel. Co. v. Steinberg (Ky.), 54 S. W. Rep. 829.

[9] 86 Tenn. 695, 6 Am. St. Rep. 864.

[10] Western Union Tel. Co. v. McCaul (Tenn.), 90 S. W. Rep. 856.

[11] Mentzer v. Tel. Co., 93 Iowa, 792, 57 Am. St. Rep. 294.

[12] Cowan v. Telegraph Co. (Iowa), 98 N. W. Rep. 281.

[13] Graham v. Telegraph Co. (La.), 34 So. Rep. 91.

[14] Simmons v. Tel. Co. (S. Car.), 41 S. E. Rep. 521, 57 L. R. A. 607; Arkansas, etc., Ry. Co. v. Stroude (Ark.), 91 S. W. Rep. 18.

[15] Lewis v. Tel. Co., 57 S. Car. 325, 35 S. E. Rep. 556; Peay v. Tel. Co., 64 Ark. 538, 43 S. W. Rep. 965, 39 L. R. A. 463.

[16] Telegraph Co. v. Ferguson (Ind. 1901), 60 N. E. Rep. 74, 54 L. R. A. 846; Connell v. Tel. Co. (1893), 116 Mo. 34, 38 Am. St. Rep. 575; Francis v. Telegraph Co. (1894), 58 Minn. 252, 49 Am. St. Rep. 507; Morton v. Telegraph Co. (1895), 53 Ohio St. 431, 53 Am. St. Rep. 648; Lewis v. Telegraph Co. (1900), 57 S. Car. 325, 35 S. E. Rep. 556; Davis v. Telegraph Co. (1899), 46 W. Va. 48, 32 S. E. Rep. 1026; Western Union Tel. Co. v. Rogers (1891), 68 Miss. 748, 24 Am. St. Rep. 300; International Ocean Tel. Co. v. Saunders (1893), 32 Fla. 434, 14 So. Rep. 148; Summerfield v. Telegraph Co. (1894), 87 Wis. 1, 57 N. W. Rep. 973; Giddens v. Telegraph Co. (1900), 111 Ga. 824, 35 S. E. Rep. 638; Peay v. Telegraph Co. (1898), 64 Ark. 538, 43 S. W. Rep. 965; Butner v. Telegraph Co. (1894), 2 Okla. 234, 37 Pac. Rep. 1087; Connelley v. Telegraph Co. (1903), 100 Va. 51, 93 Am. St. Rep. 919; West v. Telegraph Co., 39 Kan. 93, 7 Am. St. Rep. 530; Kester v. Telegraph Co., 55 Fed. Rep. 603; Western Union Tel. Co. v. Wood, 57 Fed. Rep. 471, 21 L. R. A. 706; Stansell v. Telegraph Co., 107 Fed. Rep. 668.

[17] Russell v. Telegraph Co. (1884), 3 S. Dak. 315, 19 N. W. Rep. 408; Logan v. Telegraph Co., 84 Ill. 468.

[18] See cases cited in foot-note 3 *supra*.

[19] 123 Ind. 224, 24 N. E. Rep. 163.

son v. Telegraph Co.,[20] which is the most carefully considered case on the subject, expressly overruled the Reese case. Taking into consideration, then, that but one state has been converted to the mental anguish doctrine within the last sixteen years, that fourteen states within the same time have repudiated the doctrine, that the courts of those states in which the doctrine has been adopted have limited it to a very small class of cases, with no reason except that they are already committed to the doctrine in that class of cases and do not deem it wise to extend it, and have placed numerous and often conflicting restrictions upon the right of recovery, and that one strong court, the court of final resort in Indiana, has recently seen the error of its ways and taken its place among the majority,—it is at least difficult to find any basis for the prediction that the doctrine will, at any early date, become the law generally.

In the very beginning of the editorial is the following sentence: "It is true that the great weight of authority is against allowing damages for mental suffering caused by such delays, on the ground that such an element is too uncertain for proper measurement," and further: "Here is a great wrong permitted to go unpunished because of some judicial opinion to the effect that the element is too uncertain to permit of measurement." While the uncertainty of mental anguish as an element of damages is a strong argument against the mental anguish doctrine and has been used as such in a great many of the opinions repudiating the doctrine, it certainly is not the only, nor the most important, ground for denying recovery of such damages. There are many reasons given in the cases for the position that the addressee of a "social message," who has made no contract with the company and who has suffered no injury other than the mental anguish, ought not to recover damages for the mental anguish suffered. The real reason is that recognized in the Alabama cases. It is that mental anguish is not sufficient to support an action because mental tranquility is not a right recognized and protected by the law. Every one is protected by the law in his person, his property, and his reputation, but, as there does not exist a right to privacy, so there is no right to peace of mind. In other words, mental suffering alone is not sufficient to support an action, but, given the right to maintain an action, as when the sender of the message is plaintiff and sues for the breach of the contract of transmission, compensation may be obtained for the mental suffering which directly results from the wrongful act for which the action is brought. This doctrine of the Alabama court is sound on principle, the only objection to it being the difficulty of measuring the damages. When one has once the right to maintain an action there is no reason why he should not recover damages for mental suffering occasioned by the wrongful act upon which he is suing, and this even though the action be for the breach of contract, provided, of course, that mental suffering was in the contemplation of the parties at the time of the making of the contract as the natural result of its breach. It is true that damages for mental anguish suffered as the result of a breach of contract are rarely recovered, but the reason is that mental anguish is rarely within the contemplation of the parties as the probable result of the breach of the contract, most contracts being made for pecuniary gain. In the case of sending a "social message," as in the case of a contract of marriage, mental anguish is naturally within the contemplation of the parties as a result of a breach of the contract. So also damages for mental suffering growing out of a breach of a few other classes of cases have been allowed, as in the Indiana case of Renihan v. Wright,[21] where an undertaker in violation of his contract, buried the body of a dead child in a place unknown to its parents, thereby causing them to suffer mental anguish. It is, however, the breach of the contract in these cases that supports the action and not the mental suffering. Under this doctrine, unless the sender is acting as the agent of the addressee in making the contract of transmission, or unless the contract is made solely for the benefit of the addressee, the addressee cannot recover damages for mental anguish when he is the injured party. There are several other classes of cases in which damages for mental anguish are recoverable, where the mental suffering may have been the only real injury done. Substantial damages have been allowed in cases of assault, where shame

[20] Cited in foot-note 16, *supra*.

[21] 125 Ind. 536, 9 L. R. A. 514.

and humiliation are the only real injury sufered, as where a man kisses a woman against her will,[22] but the assault being a violation of the absolute right of freedom of person, is the basis of the action. So also the violation of one's right of freedom by false imprisonment may be the basis of an action in which substantial damages may be recovered for humiliation and annoyance, when no other real injury has been suffered.[23] The real injury done a father by the seduction of his daughter is shame and mental suffering, but he cannot recover damages therefor, unless he allege and prove a loss of services.[24] Unless the father is dead and the mother is entitled to the daughter's services, she cannot recover damages for her grief and mental anguish caused by the seduction of her daughter, nor can the brother in any case recover, even though his mental suffering may be greater than that of the father. A passenger cannot recover for his mental suffering, however severe, caused by the delay of a railway train.[25] These cases are all illustrative of the fact that mental anguish alone will not support an action. Given some other basis for the action, the mental anguish may be proved to make up the damages. There are no cases, outside the telegraph cases, in which recovery has been allowed for mental anguish, apart from physical suffering, caused by negligence. The Indiana case of Western Union Telegraph Co. v. Ferguson,[26] is the strongest case against the mental anguish doctrine. One can hardly read the opinion in this case carefully, containing as it does convincing reasoning supported by an elaborate array of authorities, and fail to be convinced that the weight of reason, as well as the weight of authority, is against the mental anguish doctrine. The opinion points out seven reasons for its position that the negligent causing of mental anguish alone is not an actionable wrong. They are as follows:

1. The mental anguish doctrine is an innovation in the law. The recovery of damages for mental anguish has always been confined to two classes of cases: the one, where the mental suffering is the proximate result of physical hurt caused by the wrongful act; the other, where, as in cases of seduction and malicious prosecution, the wrongful act is affirmative and the product of intent or malice. In the first class the mental suffering is merely an incident of the physical pain, and in the second class, "the damages allowable for mental anguish are not merely compensation for the mental condition produced by the legal hurt, but are also punishment for the willful wrong." There is no reason why a departure from the established law should be made in the case of telegraph companies alone, merely because they owe a duty to the public. "The same relation exists between the public and the railroad companies, public water or gas companies, and the like; and when the mental anguish authorities join all others in the realms of English jurisprudence in declaring that merely negligent acts by these latter companies, producing mental anguish alone, are not actionable at common law, they plainly prove that the mental anguish doctrine is not a native sprout but a foreign graft."

2. There is no means by which damages of this nature may be fairly measured. The parties to a suit should have an even chance. In other cases in which damages for mental anguish are allowable, as in malicious prosecution, the mental anguish may be measured by the enormity of the willful offense. In the telegraph cases there is merely the act of simple negligence, and it is impossible to tell, except by the plaintiff's own testimony, what was the effect of the negligence upon his state of mind.

3. The mental anguish doctrine warps the rules of evidence. In order to make his case complete the plaintiff must testify that he would have gone had he received the message in time. It is contrary to the rules of evidence to allow a witness to testify to what he would or would not have done in a stated contingency.

4. Allowing testimony of this kind is unfair to the defendant and productive of perjury, since there is no way to determine whether the plaintiff would or would not have gone, except by his own testimony.

5. It is a denial of equal justice to allow recovery of damages for mental anguish caused by the negligent act of a telegraph

[22] Craker v. Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

[23] Catlin v. Pond, 101 N. Y. 649, 5 N. E. Rep. 41.

[24] Magee v. Holland, 3 Dutcher (N. J.), 861, 72 Am. Dec. 341.

[25] Wilcox v. Richmond, etc., R. Co., 52 Fed. Rep. 264.

[26] Cited in foot-note 16, *supra*.

company in regard to a message and not to allow such recovery for mental suffering caused by the negligent act of any person. On principle there can be no distinction, and courts, in the absence of statute, must be guided by principle.

6. The experiences of those courts that have adopted the mental anguish doctrine prove that the doctrine is impracticable and inexpedient. One need only to observe the many fine and unwarranted distinctions drawn in the cases and the restrictions placed without reason upon the mental anguish doctrine to realize that the prophecy of the Minnesota court,[27] that the Texas doctrine had opened a probable Pandora box, has been fulfilled.

7. "Not to tempt the seas of uncertainty, but to travel *super antiquas vias*, is the course we believe is prescribed by sound reason and the overwhelming weight of authority."

There are a few questions that have never been answered by the advocates of the mental anguish doctrine. Upon what principle is the recovery of damages for mental anguish confined to telegraph companies? If there is a difference between these cases and other cases in which mental anguish is occasioned, it is only in degree and not in principle. Why should recovery be limited to delayed messages, as suggested in the editorial? An erroneously worded message may produce mental suffering equally as great. Why is recovery confined to cases of death and last illness? Though the suffering caused by a delayed message of this sort may be greater possibly than that caused by the delay of any other, there may be severe mental suffering caused by the delay of messages in regard to other matters, and here, too, the difference is only in degree. Why is recovery confined to cases in which the relation of the parties is very close? Close relationship is not necessarily a measure of affection. Often the ties between friends are very strong, and the grief caused by being prevented from being at the bedside of a dying friend is oftentimes much greater than that caused by being unable to attend a relative in his last hours. Says Baker, J., in the opinion in the Ferguson case: "The Horatian heir who has been itching for the ancestral estates may recover on the strength of his mourning raiment, while a David who misses the last look upon the face of his Jonathan gets nothing for his aching heart."

If, then, under the principles of common law no recovery can be had by the addressee for the delay of a "social message," how can telegraph companies be compelled to be properly diligent in the transmission and delivery of this class of messages? The answer to this question is found in the opinion in the Ferguson case: "Though courts should and do extend the application of the rules of the common law to the new conditions of advancing civilization, they may not rightfully create a new principle unknown to the common law nor abrogate a known one. If new conditions cannot properly be met by the application of existing laws, the supplying of needful new laws is the province of the legislative, not the judicial department." South Carolina and Arkansas, as above pointed out, have recognized this principle by enacting statutes allowing the addressee to recover damages for negligence in regard to a "social message." In view of the difficulty of measuring damages of this nature and the danger of leaving so difficult a matter to a jury, the writer believes the best remedy to be the enactment of statutory penalties to be recovered by suit by the aggrieved party and high enough to compel telegraph companies to use due care in the transmission and delivery of these messages.

Dallas, Tex. GRAHAM B. SMEDLEY.

[27] See Francis v. Telegraph Co., 58 Minn. 252, 49 Am. St. Rep. 507.

CONVEYANCE BY HUSBAND TO WIFE WHERE SHE HAS RELINQUISHED DOWER IN OTHER PROPERTY.

PETTIT v. COACHMAN.

Supreme Court of Florida, June 5, 1906.

A deed of conveyance of land from the husband to the wife is not a voluntary deed when the wife has relinquished her right of dower in other lands and agreed to relinquish her right of dower in still other lands belonging to the husband, in consideration o the conveyance.

A deed of conveyance of land from the husband to the wife conveys the title to the wife, and, when the coveyance is not voluntary, the mere failure to record the deed does not render it void as to a simple creditor of the husband whose claim is not in excess of the value of the land remaining to the husband subject to execution in the absence of fraud or other inequitable circumstances.

Where the husband has conveyed land to the wife by deed upon proper, *bona fide*, and valuable consideration, such land is not subject to sale under an execu-

tion issued against the husband in an action brought after the deed of conveyance was recorded.

Where a conveyance of land has been made by deed from the husband to the wife upon a valuable and *bona fide* consideration not named in the deed, and the land has been sold under execution against the husband issued in an action brought after the record of the deed of conveyance, such sale is a cloud upon the title of the wife, which equity may remove.

WHITFIELD, J.: On May 19, 1904, the appellant, Collions I. Pettit, a married woman, filed in the circuit court for Hillsborough county a bill in chancery against S. S. Coachman and S. A. Pettit, husband of the appellant. The bill alleges that on June 10, 1903, the defendant S. S. Coachman began suit in the circuit court of Hillsborough county against S. A. Pettit and recovered judgment thereon by default on September 4th following, said judgment being for the sum of $204.21 and costs; that thereafter certain real estate described in the bill was advertised for sale under execution by the sheriff of Hillsborough county, and on October 5, 1903, sold; that defendant S. S. Coachman was the purchaser at said sale, paying for the said lands the small sum of $100, which was credited upon his said judgment; that a large portion of said real estate sold and purchased by said defendant, the description being given, was and is the separate property of complainant, and not that of her husband; that said tract of land was acquired by complainant's husband in the year 1883 by homestead; that subsequently, on the 2d day of August, 1893, he conveyed the said property directly to complainant as shown by a copy of the deed annexed and made a part of the bill; that the consideration of said deed as expressed on the face thereof was $1, but that, in fact, the said conveyance was made in fulfillment of a promise on the part of the said S. A. Pettit, complainant's husband, to convey real property to her in return for complainant's joining the said S. A. Pettit in the deeds to several described tracts of land theretofore made; that these several tracts of land were valuable, and that complainant would not have joined her husband in the execution of deeds to the same but for his express promise that he would convey to her the said land which he did convey as aforesaid; that the complainant further entered into an agreement with her said husband for the said lands conveyed to her as aforesaid, that he might do as he liked with the remainder of his said property, and that complainant would join in the execution of all deeds without protest or additional compensation or consideration: that at the time of making her the said deed her husband had other property, real and personal, far in excess of all of his liabilities; that while it is true that even at that time her husband had transactions with the said defendant S. S. Coachman, the accounts between them were mutual and unbalanced, and remained so until the year 1898, when complainant's husband gave the said S. S. Coachman his note for the balance due, and it was upon this note that the said S. S. Coachman obtained his judgment as aforesaid; that complainant was not familiar with the formalities required for the transfer of title to real property, and that she considered the said deed given her by her husband as aforesaid, perfect, and conveyed to her the legal title, and that her husband intended to give such effect to his deed; that complainant intrusted the registry of said deed to her husband, S. A. Pettit, but that through neglect the said deed was not recorded until March 21, 1903; that the said deed was recorded long before the defendant S. S. Coachman began suit against complainant's husband; that said defendant S. S. Coachman knew as a matter of fact, and was chargeable with knowledge as a matter of law, with the complainant's rights and equities in the premises; that as to complainant's property the said S. S. Coachman was not a *bona fide* purchaser at the said execution sale; that his action therein was a fraud upon the rights of complainant; that at the time of the levy of said execution on and sale of complainant's property as aforesaid complainant was not in the county of Hillsborough, but in the county of Lee, state of Florida; that complainant was in no way a party to the said suit of S. S. Coachman against her said husband; although she knew of the said sale as a matter of fact, she was then financially wholly unable to employ counsel to protect her interests, and that it is only now that she is able to assert her rights by an appeal to this court; that the sale of her said property was wholly void as to complainant; that at the time of the said sale she held both the legal and equitable title thereto, and that the said sale in no way affects the title of complainant to the said property, yet complainant says the said sale of complainant's land and the sheriff's deed thereto made to the defendant S. S. Coachman cast a cloud upon the title of complainant to the said property, and render the land of far less value for purpose of sale; that said lands are wild and uncultivated. The prayers are that the said sale of complainant's land be decreed to be null and void and of no effect, and that the said deed executed by the sheriff of Hillsborough county to S. S. Coachman be declared null and void, and in no way transferring any right, title or interest in the said property of complainant to S. S. Coachman, and that all doubts as to and clouds upon the title of complainant be cleared away, and complainant's title thereto be declared perfect, and for general relief. The oath to the answer was expressly waived in the bill.

The defendant S. S. Coachman answered, in substance, as follows: He admits that he instituted his suit against S. A. Pettit and recovered judgment as alleged, and admits that the property described in the bill of the complainant was levied upon, advertised and sold as alleged. He denies that the real estate claimed by the complainant was her separate property; denies that there was any consideration for the execution of the deed from S. A. Pettit to his wife, the complainant; avers that prior to the time of obtaining the judgment referred to, the said S. A. Pet-

tit and the said complainant had abandoned said property as a homestead; and denies that the defendant S. A. Pettit, the husband of complainant, had any real or personal property in excess of his liabilities at the time the so-called deed was made from Pettit to his wife. But he avers that the said defendant S. A. Pettit was at the time insolvent and unable to pay his debts; that at the time of the execution of said so-called deed from Pettit to his wife the complainant well knew that the defendant Pettit was indebted to this defendant and was unable to pay the same; that the deed under which the complainant claims said property was in the possession of the complainant as alleged from the year 1893 until March, 1903, and was never recorded until March, 1903, and that this defendant had no knowledge, either directly or constructively, of said deed at the time he took the note from the defendant Pettit upon which he obtained the judgment, nor did this defendant have any knowledge, either personal or constructive, until the same was filed for record; that he did not know that said deed had ever been recorded until the bill in this cause was filed; that he had no knowledge, and has no knowledge, of any antecedent promise made by the defendant Pettit to the complainant, and did not have any knowledge that the complainant claimed any right, title or interest in and to any part of the property described in the complainant's bill until the said bill of complaint in this cause was filed.

A general replication was filed on March 3d, and on the same day a special master was appointed to take the testimony. Upon hearing on the pleadings, testimony and report of the master, the court found for the defendants, and the bill of complaint was dismissed. The complainant took an appeal to the present term of this court, and assigns as errors that the court erred (1) in decreeing the equities to be with the defendant; (2) in finding that the complainant's bill should be dismissed; (3) in finding that the complainant was not entitled to the relief as prayed for in the bill of complaint.

The admissions of the answer and the testimony show in substance that S. A. Pettit acquired 160 acres of land in 1883, as a homestead from the United States government; that he conveyed to different parties between the years 1885 and 1888 several parcels of the land aggregating 26 acres, for 15 acres of which he received $350, the other 11 acres being donated to a railroad and for school purposes, the whole 26 acres being valued at about $405; that before his wife would sign the conveyances of these several parcels of the land the husband, in consideration of the wife joining in such conveyances, promised to convey to the wife about 50 acres of the land for a home; that for said 50 acres the wife promised also to join in conveying the remainder of the land; that the husband executed and delivered to the wife a deed dated August 2, 1893, to about 50 acres of the land, the consideration recited in the deed being $1, and the value of the land at the time of the conveyance being $500; that the deed was delivered to the wife, and was not recorded till March 21, 1903; that the value of the remainder of the land was about $800; that the land was abandoned as a homestead before the deed to the wife was made, by the husband and wife removing to another county; that about 1892, after the homestead was abandoned, the husband became indebted to S. S. Coachman, one of the defendants, and finally gave a note for the amount found due in 1898; that "when the suit came up Mr. Coachman wanted to take this land, and then he (the husband) had the deed recorded to keep Mr. Coachman from taking the whole thing;" that the deed was recorded March 21, 1903; that action on the note was begun June 10, 1903, and judgment by default was recovered September 4, 1903, for $204.21 and $19 costs; that under the execution issued on such judgment the land claimed by the wife, together with other land, was sold by the sheriff to S. S. Coachman on October 5, 1903, for $100; that in 1893 the husband, in addition to the land above mentioned, owned about $200 worth of personal property; that the land in controversy is wild land.

The conveyance in this case from the husband to the wife was not strictly a voluntary conveyance; for it is shown without contradiction that the wife relinquished her right of dower in other lands the husband had conveyed, in consideration of the promise of her husband to make this conveyance to the wife, and that as a further consideration the wife agreed to relinquish her right to other lands of the husband. Nalle v. Lively, 15 Fla. 130; Rivers v. Rivers, 38 Fla. 65, 20 So. Rep. 807. The deed from the husband to the wife conveyed the title to the wife. See chapter 5147, p. 85, Acts 1903; Waterman v. Higgins, 28 Fla. 660, 10 So. Rep. 97; Claflin v. Ambrose, 37 Fla. 78, 19 So. Rep. 628; Hill v. Meinhard, 39 Fla. 111, 21 So. Rep. 805; American Freehold Land & Mortgage Co. v. Maxwell, 39 Fla. 489, 22 So. Rep. 751.

The indebtedness of the husband to Coachman was contracted in 1892, and the conveyance to the wife was executed in 1893; but it appears that after the husband made the conveyances in which the wife joined, and also the conveyance to the wife, the land remaining to him subject to execution was worth about $800, and the amount of the judgment recovered on his indebtedness was $204.21 and costs. Therefore, in the absence of any other showing of indebtedness or any showing of actual fraud or other circumstances, it cannot be said that the mere failure to record the deed from the husband to the wife rendered the deed invalid as to the simple creditor, S. S. Coachman, who brought his action several months after the deed was recorded. See Hill v. Meinhard, 39 Fla. 111, 21 So. Rep. 805. It is clear from the showing here made that the deed was not a voluntary one; and, as it was recorded before the creditor brought his action or acquired a judgment or other lien, the facts of this case give the creditor no equities superior to the rights of the complainant. The legal title of the complainant was not affected by the judgment obtained

against her husband, and the sale under the execution against the husband cast a cloud upon the title, which equity may remove.

The decree is reversed, at the cost of the appellees, and the cause is remanded, with directions that a decree for the complainant be entered in conformity with the prayer of the bill.

NOTE.—*Where a Wife has Relinquished her Right of Dower in Other Lands and Agreed to Relinquish her Right of Dower in Still Other Lands Belonging to Husband, a Conveyance of Land by Husband to Wife is not a Voluntary Conveyance.*—This case presents one of the phases which may arise in cases where conveyances from husband to wife are alleged to have been fraudulent. We do not find that this particular phase has hitherto been considered in the CENTRAL LAW JOURNAL. It is a question which may frequently arise in view of the course pursued in the principal case, and there are many decisions upon this particular subject. It certainly would seem to be a proper course to pursue where there was no fraud practiced upon creditors in so doing. The facts in the principal case show a good consideration for the property secured by the wife in her name. That being so, it necessarily follows that the failure to record her deed for a year should not be regarded as such laches on her part as to make such property subject to the husband's debts. And this would be particularly true when it appears that the property in which she released her right of dower was more than enough to pay her husband's debts. All this goes to show that the law is nothing more than the application of common sense principles to a given state of facts. Good common sense is a rare gift, however. To be able to apply the rules of law to a given state of facts, one must have a thorough knowledge of the facts and their relationships, as well as the principles of law and their relationships. There is a growing carelessness on the part of lawyers and judges in these respects. The Florida Supreme Court, however, has not evinced in its opinions any desire to escape the responsibilities with which it is confronted, for we find their opinions full of the evidence of careful consideration.

It was held in the case of Bank of the United States v. Lee, 38 U. S. (13 Pet.) 107, that the release of the wife's right of dower in certain lands of the husband, is sufficient consideration to support a deed by the husband to the wife of other property as against the husband's creditors, though the release be subsequent to the deed, if made in good faith and in pursuance of an agreement preceding the deed. It was also held in Hitz v. National Metropolitan Bank, 111 U. S. 722, that a deed by a husband and wife in trust for her benefit, of real estate of the wife in which he joins in order to convey his estate in curtesy, upon the wife joining with him in conveying other property in which she is interested, to relieve him from financial embarrassment, is made on a valuable consideration, which may sustain the conveyance as against his creditors, if free from fraud.

Another phase is found in the case of Wright v. Stanard, Fed. Cas. No. 18,094 (2 Brock. 311), where husband and wife made a conveyance of land to trustees for the use and benefit of the wife, in consideration of the wife's relinquishing her right of dower in other lands for the payment of the husband's debts, although the value of the right of dower is only about one-third of the value of the land conveyed for her benefit, yet such conveyance is not absolutely void, but in a court of law must be adjudged absolutely valid. But in equity such deed will be considered as valid only to the extent of the value of the dower released by the wife. So, it was held in the case of Gordon v. Tweedy, 71 Ala. 202, that, "the conveyance by a husband to his wife of land worth from $4,000 to $5,000, in consideration of her release of dower in another tract which he had sold, the value of which was not shown, railroad stock worth $485, alleged to belong to her, which he had sold and converted, an indebtedness to her for money belonging to her, $646, he, at the time being financially embarrassed, it was held that the inadequacy of the consideration was such as to make the conveyance constructively fraudulent." The same principles shown in the above cases may be found in the cases of Keel v. Larkin, 83 Ala. 142, 3 So. Rep. 296, 3 Am. St. Rep. 702; McCaffey v. Dumsten, 43 Ill. App. 34; Hollowell v. Simonson, 21 Ind. 398; Sedgwick v. Tucker, 90 Ind. 271; Philips v. Kennedy, 139 Ind. 419, 38 N. E. Rep. 410; Haynes v. Kline, 64 Iowa, 308, 20 N. W. Rep. 453; Marshall v. Hutchinson, 44 Ky. 298; Harrow v. Johnson, 60 Ky. (3 Metc.) 578; Ward v. Crotty, 61 Ky. (4 Metc.) 59; Garvey v. Moore (Ky.), 15 S. W. Rep. 136; Unger v. Price, 9 Md. 552; Holmes v. Winchester, 136 Mass. 140; German American Seminary v. Saenger, 66 Mich. 249, 33 N. W. Rep. 301; Peaslee v. Collier, 83 Mich. 549, 47 N. W. Rep. 353; Woodson v. Poole, 19 Mo. 340; Rundlett v. Ladd, 59 N. H. 15; Clinton Bank v. Cummings, 38 N. J. Eq. (11 Stew.) 199; Smart v. Haring, 14 Hun, 276, modifying judgment of same, 15 How. Pr. 505; Singree v. Welch, 32 Ohio St. 320; Commonwealth Title Ins. & Trust Co. v. Brown, 166 Pa. St. 477, 31 Atl. Rep. 205, 36 Wkly. Notes Cas. 190; Blanton v. Taylor, Gilmer, 209; Johnson v. Gilb, 27 Grat. 587; Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; Lesaulnier v. Krueger, 85 Wis. 214, 54 N. W. Rep. 774, and Fraudulent Conveyances, sec. 260, Cent. Dig.

JETSAM AND FLOTSAM.

A CORRECTION.

[The following note should have been published as the note to the case of Western Union Telegraph Co. v. Houston Rice Mill. Co., published in the issue of October 19, 1906, on page 306 of the present volume.—EDITOR.]

NOTE.—*A Telegraph Message Unnecessarily Delayed by Company Subjects Company to Damages Where Such Message Shows on its Face Importance of Prompt Delivery.*—The opinion in the principal case seems to be wholly based upon sound sense and in accordance with previous opinions of the supreme court. At first blush it would seem that the rule is perhaps carried somewhat beyond the expressions of the supreme court in the case of Western Union Telegraph Co. v. Adams, 75 Tex. 531, 16 Am. St. Rep. 920, with reference to cipher telegrams, yet a careful analysis of it, shows it an authority for the position of the principal case. The question was, in the Adams case, was there enough in the telegram itself to put the parties on notice? The telegram read as follows: "Clara, come quick. Rufe is dying." The defense set up by the telegraph company must appear, if presented to the majority of mankind, which had no reason to be biased one way or another, as being absurd. It was: "The message did not disclose that the relationship of brother and sister existed between 'Rufe' and 'Clara,' nor did the allegation in the petition disclose that appellant had notice of the relationship existing between them at the time it contracted to transmit said message, and by reason of the want of notice of this fact appellant cannot be held liable for the damages

sued for herein." If it was important enough for some one to know of such a fact, and the reasonable presumption would be that the person to whom the message was sent was a near relative, it was certainly as important that the message be delivered as soon as possible, for it said, "Rufe is dying, come quick." What greater suggestion of the importance of a prompt delivery could be needed, beggars conception? It is hard to understand how a telegraph company may in any event escape responsibility for promptness in delivering telegrams. One sends a telegram with the very object of prompt delivery in view. There is no excuse for delay. Telegraph companies are paid enough to exercise themselves about prompt deliveries, and yet, as a matter of fact, particularly in small places, there is a great deal of carelessness in the matter.

In the principal case the nature of the business was in itself sufficient to put the agent of the company on guard, for every one knows that the grain markets fluctuate, and the author of the dispatch was a milling company, asking for information. Here we have three elements in combination. An undertaking on the part of the telegraph company, in its very nature demanding promptness in its execution, and offering it a good price for such promptness and enough on the face of the telegram to show that the delivery should be prompt. It would seem a mighty poor policy of the law which would not, under such circumstances, hold a telegraph company, for a failure to promptly deliver the message, for such damages as may have resulted from the delay. They exercise the right of eminent domain; are *quasi*-public corporations, with compensation enough to furnish the very best facilities for delivering messages. Therefore they should be held to a high degree of diligence in the execution of their undertaking. Public policy demands it. It would be best for the company to be so held, because such suits as that of the principal case would not then often arise. Their officers would take good care to see that they did not. Says Mr. Joyce: "They undertake for a consideration to transmit messages, intelligence or communications, not exclusively for particular persons, but for all. These corporations have valuable franchises conferred upon them. They exercise the right of eminent domain by reason solely of the public nature of their business. They must have suitable and approved instruments and appliances, employ competent servants and agents and skilled operators, and are held to a high degree of care, diligence and skill adequate to or commensurate with their employment or undertaking. They are also subject to constitutional and legislative control and lawful police regulations." Joyce on Electric Law, sec. 14; Western Union Tel. Co. v. Short, 53 Ark. 434; Tyler v. Western Union Tel. Co., 60 Ill. 421; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Western Union Tel. Co. v. Beerhaus, 8 Ind. App. 246; Hockett v. State, 105 Ind. 250; Smith v. Western Union Tel. Co., 83 Ky. 104.

In view of the above the conclusion in the principal case must be regarded as well founded and just. In the case of the Western Union Tel. Co. v. Fatman, 73 Ga. 292, Mr. Justice Jackson, in delivering the opinion of the court, said: "Whilst the duties of the telegraph company are similar to those of the ordinary common carriers, and so much so as to make it proper to call them, as *quasi* common carriers, yet as their charges are based upon the number of words, and not on weight, as carriers of ordinary freight, or on value, as express companies, the rule of liability should not be the same as respects notice or no notice of the value of the dispatch. The word 'dispatch' is the very core of the body of such a company, whether it be called a carrier or bailee or any other name. People write messages by them and not by the slower mails, because they are in need of haste. Business or family necessity, sickness or death, make dispatch, in this mode of conveyance, the very consideration upon which they use it, on which they pay higher rates for it, for which the privileges are granted to them by the public, and surely the message so sent, when received, must be delivered with reasonable dispatch in all cases, and if not the damages sustained by failure must be paid. The thing they undertake for money to carry must be carried to the place of destination, and that is to the office or house where due, for nobody goes or is required to go to their office for answer, but it is their duty to send it to them. Besides, if a cipher or unintelligible communication, might be rejected by them or put on terms by special contract, and if in this sense they may not be common carriers of everything, yet when they undertake to carry it, and receive messages and money in consideration of the one to deliver the other, ought it not to be done?" This Georgia case seems to more than support the principal case. It is based upon sound principles and is the logical conclusion in view of the nature of such an undertaking as the court had in hand.

The weight of authority with regard to cipher dispatches, where their importance is not communicated to the telegraph company, is against holding the company liable for more than the amount received, yet in the principal case the distinction is made that the language and the circumstances under which the company received the telegram amounted to an information.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ACCORD AND SATISFACTION—Intention of Parties.—Full payment by a city for a public improvement was not an accord and satisfaction, precluding the city from maintaining an action against the contractor for his negligence in failing to guard an excavation, whereby a judgment had been recovered against the city.—City of Spokane v. Costello, Wash., 84 Pac. Rep. 652.

2. ACTION—Equitable Defenses.—Fraud in procuring a release may be set up against a plea of accord and satisfaction in an action at law.—Memphis St. Ry. Co. v. Giardino, Tenn., 92 S. W. Rep. 855.

3. ADJOINING LANDOWNERS—Lateral Support.—Person making excavation on lot negligently held liable for injuries to building of adjoining owner, notwithstanding Rev. Civ. Code, §§ 187, 291—Hannicker v. Lepper, S. Dak., 107 N. W. Rep. 202.

4. ADVERSE POSSESSION—Evidence.—That one claiming title by adverse possession failed to pay taxes is entitled to weight as tending to show that he did not intend to claim title as against the rightful owner.—Bush v. Griffin, Neb., 107 N. W. Rep. 247.

5. ALIENS—Chinese Exclusion.—The decision of the appropriate immigration officers, denying entry to Chinese persons who claimed the right on the ground that they were minors and their fathers respectively were lawful residents of the United States, if not appealed from, and no abuse of discretion is shown, is conclusive, and cannot be reviewed by the courts.—*Ex parte* Wong Sang, U. S. D. C., D. Mass., 143 Fed. Rep. 147.

6. APPEAL AND ERROR—Burden of Showing Error.—The action of a court in vacating its former decision in the same cause will be presumed correct, and a person complaining of such an order must show affirmatively that it is erroneous.—*In re* Bouyssou's Estate, Cal., 84 Pac. Rep. 460.

7. APPEAL AND ERROR—Dismissal.—A motion to dismiss an appeal for an alleged irregularity not of a jurisdictional nature will not be entertained where not urged until after argument and a rehearing ordered.—Raymond v. Edelbrock, N. Dak., 107 N. W. Rep. 194.

8. APPEAL AND ERROR—Failure to Ask Definite Instructions.—A party cannot complain that an instruction is couched in too general terms where he has requested no specific instruction.—Gamache v. Johnston Tin Foil & Metal Co., Mo., 92 S. W. Rep. 918.

9. APPEAL AND ERROR—Guardian and Ward.—Where the record on appeal shows the giving of a defective statutory notice to a ward of his guardian's application for leave to sell his real estate, it cannot be presumed from the fact that the sale was confirmed by the probate court that any other notice was given.—Beachy v. Shomber, Kan., 84 Pac. Rep. 547.

10. APPEAL AND ERROR—Instructions as to Testimony of Accomplice.—It was not prejudicial error to fail to instruct that no conviction could be had on the uncorroborated testimony of an accomplice where the accused himself testified to substantially the same facts as the accomplice.—Finch v. Commonwealth, Ky., 92 S. W. Rep. 940.

11. APPEAL AND ERROR—Joint Demurrer.—A codefendant, not having demurred to the bill, cannot complain, on appeal, of the overruling of a demurrer interposed by his codefendants.—A. Shiff & Son v. Andress, Ala., 40 So. Rep. 824.

12. APPEAL AND ERROR—Separation of Witnesses.—Permission to allow witness to remain in courtroom during trial while other witnesses were excluded held presumed, on appeal, to have been for good cause.—Hiass v. Fulford, Ark., 92 S. W. Rep. 862.

13. APPEAL AND ERROR—Service by Publication.—Where plaintiff fails to amend a defective affidavit for service by publication and a defective return of a service of summons, he will be deemed to have elected to stand on the original affidavit and return.—Goldie v. Stewart, Neb., 107 N. W. Rep. 245.

14. ASSIGNMENTS—Principal and Surety.—In a suit by the surety of the treasurer of an insurance society on an assignment of the society's claim against defendants, it was no defense that the loss to the society was caused by the treasurer's criminal conduct, for which complainant was liable as surety.—Fidelity & Deposit Co. of Maryland v. Fidelity Taust Co., U. S. C. C., D. N. J., 143 Fed. Rep. 152.

15. ATTORNEY AND CLIENT—Disqualification of Attorney.—An attorney for executors held disqualified to represent the heirs for the purpose of supervising the executors' proceedings for distribution.—Bryant v. McIntosh, Cal., 84 Pac. Rep. 440.

16. BANKRUPTCY—Appealable Orders.—A petition filed in a court of bankruptcy to establish the right of petitioner to the possession of property as against a trustee, and to enjoin the latter from interfering with such possession, presents a "controversy arising in the course of bankruptcy proceedings," and the order or decree entered thereon is reviewable by appeal.—Security Warehousing Co. v. Hand, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 32.

17. BANKRUPTCY—Effect of Filing Petition.—Under Bankr. Act July 1, 1898, ch. 541, § 70a, subds. 4, 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], the bankrupt's trustee held entitled to recover the proceeds of property obtained by creditors by attachment between the date the bankruptcy petition was filed and the date of the adjudication.—State Bank of Chicago v. Cox, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 91.

18. BANKRUPTCY—Life Insurance Policies.—Policies of life insurance of a bankrupt having an actual value pass to his trustee, and the bankrupt is divested of all interest therein unless he retains the same, under the proviso to Bankr. Act July 1, 1898, ch. 541, § 70a (5) 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], by paying the cash surrender value.—Clark v. Equitable Life Assur. Soc., U. S. C. C. E. D. Pa., 143 Fed. Rep. 175.

19. BANKRUPTCY—Objections Not Made at Trial.—A bankrupt's trustee held not entitled to urge for the first time on appeal an absence of the bankrupt's liability on certain notes indorsed by it, because of the absence of proof of presentment for payment at maturity and protest.—Love v. Export Storage Co., U. S. C. C. of App., Sixth Circuit, 143 Fed. Rep. 1.

20. BANKS AND BANKING—Misappropriation of Funds.—The managing agents of a trust company held personally liable to the owner of money misappropriated.—Sweet v. Montpelier Sav. Bank & Trust Co., Kan., 84 Pac. Rep. 542.

21. BANKS AND BANKING—Payments by Mistake.—A bank held entitled to recover money paid out by it by mistake upon the order of a person not a depositor.—Merchants' Bank of Port Townsend v. Superior Candy & Cracker Co., Wash., 84 Pac. Rep. 604.

22. BILLS AND NOTES—Negotiability.—The negotiable quality of notes is not destroyed by a provision therein that the sureties consent that time of payment may be extended without notice.—Farmer, Thompson & Heisell v. Bank of Graettinger, Iowa, 107 N. W. Rep. 170.

23. BOUNDARIES—Marked Line.—Where a line fence had been acquiesced in as a boundary for 15 years, the line thereby established was not affected by an oral agreement to have a survey to establish the true line.—Uker v. Thieman, Iowa, 107 N. W. Rep. 167.

24. BROKERS—Acting for Both Parties.—Where a broker is employed by each party with notice that he is acting in the matter for the other, and with such notice each agrees to pay him his commission, he can recover from both.—Wasser v. Western Land Securities Co., Minn., 107 N. W. Rep. 160.

25 BROKERS—Sale of Land.—An owner of real estate, employing an agent to sell it at a price stated and on terms to be thereafter agreed upon, held liable for commission when broker produces a buyer.—Long v. Thompson, Kan., 84 Pac. Rep. 552.

26. CANCELLATION OF INSTRUMENTS—Unjust Provisions.—Where it is plain that one party to a contract has

gained an unjust advantage over the other which it would be inequitable to permit him to enforce, equity should set the contract aside, though the party victimized was careless.—Stone v. Moody, Wash., 84 Pac. Rep. 617.

27. CARRIERS—Bill of Lading.—A finely printed provision in a bill of lading, that in case of injury to the goods only the carrier having custody of them at the time of the injury shall be liable, held not a part of the contract.—Allen & Gilbert-Ramaker Co. v. Canadian Pac. Ry. Co., Wash., 84 Pac. Rep. 620.

28. CARRIERS—Conduct of Passenger.—A passenger is bound to observe and obey reasonable rules established for the convenience and comfort of other passengers, and on his failure to do so his ejection is warranted.—McQuerry v. Metropolitan St. Ry. Co., Mo., 92 S. W. Rep. 912

29. CARRIERS—Joint Tort Feasors.—An agent of a carrier corporation and the corporation held joint tort-feasors in the transportation of plaintiff's cattle over a longer route than necessary, and suable jointly or separately at plaintiff's election.—Eastin & Knox v. Texas & P. Ry. Co., Tex., 92 S. W. Rep. 838.

30. CHATTEL MORTGAGES—Acceptance of Proceeds.—Where a chattel mortgagee consents to the sale of the mortgaged property by the mortgagor, neither the mortgagee nor one who receives from him the proceeds of the sale can be charged with conversion.—Farmer, Thompson & Hellsell v. Bank of Graettinger, Iowa, 107 N. W. Rep. 170.

31. CHATTEL MORTGAGES—Lien on Crops.—The lien of a landlord or seller under a conditional contract of sale or lease held superior to that of one claiming under a crop mortgage.—Bedford v. Gartrell, Miss., 40 So. Rep. 801.

32. CHATTEL MORTGAGES—Mortgage by Bailee.—Where cattle are delivered to another to be fed, the interest of such other person to be what he may put on them, and such bailee executes a mortgage thereon, when they have gained nothing, the mortgage is void.—First Nat. Bank v. McIntosh & Peters Live Stock & Commisson Co., Kan., 84 Pac. Rep. 535.

33. CHATTEL MORTGAGES—Priority of Lien.—In an action to foreclose a chattel mortgage, evidence held to sustain a finding that the claim of lien of plaintiff bank thereunder was prior in time, and therefore superior in right to that held by defendant bank.—Bank of America v. Waggoner, U. S. C. C. of App., Fifth Circuit, 148 Fed. Rep. 53.

34. COMMERCE—Intoxicating Liquors.—A consignment to one without his knowledge held not an interstate commerce transaction.—Adams Express Co. v. Commonwealth, Ky., 92 S. W. Rep. 932.

35. COMMERCE—Intoxicating Liquors.—City ordinance requiring license to be paid by persons selling beer held not repugnant to the commerce clause of the federal constitution as applied to individual carrying on independent domestic business in sale of beer by barrel which has been brought into the state and disposed of by him in original packages.—City of Mobile v. Phillips, Ala., 40 So. Rep. 826.

36. COMPROMISE AND SETTLEMENT—Agreement Not to Appeal.—Forbearance to prosecute proceedings for the reversal of a judgment is a sufficient consideration for a compromise, and unless the good faith of the claimant in pressing his claim is put in issue, whether he intended to prosecute such proceedings is immaterial.—Gering v. School Dist. No. 28, Cass County, Neb., 107 N. W. Rep. 250.

37. CONSTITUTIONAL LAW—Construction.—The state constitution is a limitation on power, and unless legislation duly passed be clearly contrary to some express prohibition therein, the courts have no authority to declare it invalid.—Thomas v. Williamson, Fla., 40 So. Rep. 831.

38. CONSTITUTIONAL LAW—Police Power.—Rev. St., ch. 29, § 40, declaring certain liquors to be intoxicating, irrespective of their real intoxicating character, is a legal exercise of police power, and not in contravention of Const. U. S. Amend. 14.—State v. Frederickson, Me., 63 Atl. Rep. 585.

39. CONSTITUTIONAL LAW—Railroad Ticket Scalpers.—Laws 1905, p. 422, prohibiting ticket brokerage business, held not repugnant to Const. U. S. Amend. 14, nor to State Const., art. 1, § 10, guarantying due process of law.—State v. Thompson, Oreg., 84 Pac. Rep. 476.

40. CONTRACTS—Ambiguity.—Where a contract is susceptible of two constructions, one of which will accomplish the intention of the parties and make the contract enforceable, while the other would make it unenforceable, the former is to be preferred.—T. M. Sinclair & Co. v. National Surety Co., Iowa, 107 N. W. Rep. 184.

41. CONTRACTS—Construction.—A contract for the furnishing of a stated quantity of stone ballast for a railroad, to be delivered in daily installments, construed, and held to bind the purchasers for the entire quantity.—Quigley v. Spencer Stone Co., U. S. C. C. of App., Seventh Circuit, 148 Fed. Rep. 86.

42. CORPORATIONS—Estoppel.—Where a corporation obtained the fruits of a transaction conducted by its president by which he warehoused certain of its assets, it was thereafter estopped to deny that such transaction was within the president's authority.—Love v. Export Storage Co., U. S. C. C. of App., Sixth Circuit, 148 Fed. Rep. 1.

43. CORPORATIONS—Liability of Stockholders for Unpaid Stock.—The right of action by a creditor of a corporation to enforce the unpaid stock subscriptions accrues at least as soon as the corporation disposes of all of its property, ceases to become a going concern, and becomes insolvent, notwithstanding Ballinger's Ann. Codes & St., § 4262.—Chilburg v. Siebenbaum, Wash., 84 Pac. Rep. 598.

44. CORPORATIONS—Salaries of Officers.—Directors of a corporation cannot vote salaries to themselves, nor can they vote a salary to one of their number as president at a meeting, where his presence is necessary to a quorum.—Camden Land Co. v. Lewis, Me., 63 Atl. Rep. 523.

45. CORPORATIONS—Sale of Stock.—An officer of a corporation, employed on a salary to sell its stock for the benefit of the corporation, cannot charge it to himself, or account for it at an arbitrary price when sold, and pocket the surplus, if any.—Camden Land Co. v. Lewis, Me., 63 Atl. Rep. 523.

46. COURTS—Record.—Where a demurrer to a petition states several grounds, and is sustained on one of them, the court may, at a subsequent term, amend the record, so as to state upon what ground the demurrer was sustained.—Martindale v. Batte, Kan., 84 Pac. Rep. 527.

47. CRIMINAL LAW—Jurors.—The sustaining of a challenge to a juror for inability to understand the English language is within the discretion of the trial court.—State v. Crouch, Iowa, 106 N. W. Rep. 173.

48. CRIMINAL TRIAL—Continuance.—The trial judge is invested with large discretion to grant or refuse a motion for a continuance.—State v. Douglas, La., 40 So. Rep. 860.

49. CRIMINAL TRIAL—Harmless Error.—In criminal case there was no error in the court calling a witness to the judge's bench and having a conversation with him in the presence, but not in the hearing, of the jury.—Young v. State, Tex., 92 S. W. Rep. 841.

50. CRIMINAL TRIAL—Instruction.—In a prosecution for rape, the court's refusal to require that a conviction should be based on the jury's belief that the act occurred at or near a certain hour of the day in question held error.—People v. Morris, Cal., 84 Pac. Rep. 463.

51. CRIMINAL TRIAL—Writ Coram Nobis.—A writ *coram nobis* will not be issued to review a conviction of homicide on the ground that a juror swore falsely as to his qualifications on his *voir dire*.—State v. Armstrong, Wash., 84 Pac. Rep. 584.

52 DAMAGES—Burden of Proof.—In action for breach of contract of sale for refusal on the part of the vendee to accept the goods, if the pleadings and the evidence fail to furnish such data for damages, only nominal damages can be recovered.—Parkins v. Missouri Pac. Ry. Co., Neb., 107 N. W. Rep. 260.

53. DAMAGES — Remote Damages. — For a breach of contract, even through bad faith, a contractor can recover no more than the damages which are the direct consequence of the breach.—Cusachs & Co. v. Sewerage & Water Board of New Orleans, La., 40 So. Rep. 855.

54. DEED—Mortgage.—A deed absolute in form will only be declared a mortgage on clear and satisfactory proof that the deed was given as security for a debt, etc. —Reynolds v. Reynolds, Wash., 84 Pac. Rep. 579.

55. DIVORCE—Alimony.—In an action for divorce, the complaint, in order to justify an allowance of alimony to the wife, should allege her necessity therefor and the husband's ability to pay it.—Ryan v. Ryan, Mont., 84 Pac. Rep. 494.

56. DIVORCE—Allowance for Attorney's Fees.—An allowance of $474.50 attorneys' fees in an action for divorce, one-half of which was for services on motions respecting attorney's fees and substitutions of attorneys, should be reduced to $250.—Schulz v. Schulz, Wis., 107 N. W. Rep. 302.

57. EMINENT DOMAIN—Condemnation Proceedings.—Where 12 persons claimed interests in the property in condemnation proceedings, it would be presumed that it was not error to strike a cross-petition demanding separate awards of damages.—City of Seattle v. Park, Wash., 84 Pac. Rep. 644.

58. EMINENT DOMAIN—Elements of Damages. — The personal inconvenience and discomfort occasioned to the owner of abutting property by the operation of a railroad in the street gives rise to no cause of action.—Grossman v. Houston, O. L. & M. P. Ry. Co., Tex., 92 S. W. Rep. 836.

59. EMINENT DOMAIN—Perpetual Easement.—Where a perpetual easement of an entire tract of land is condemned, it is error to instruct that only an easement was appropriated, unless the jury are further instructed that in determining the damages no value should be attached to the remaining fee.—Dethample v. Lake Koen Nav., Reservoir & Irrigation Co., Kan., 84 Pac. Rep. 544.

60. EQUITY—Adequate Remedy at Law.—A bill against certain depositaries of the funds of an insurance society to enforce an alleged liability arising out of embezzlements by the society's treasurer held not objectionable, in that complainant had an adequate remedy at law.—Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co. U. S. C. C., D. N. J., 143 Fed. Rep. 152.

61. EQUITY—Res Judicata.—Where a plea of *res judicata* in a suit to set aside a cloud on title alleged no appeal from the judgment, which was not proved, the plea was ineffective.—A. Shiff & Son v. Andress, Ala., 40 So. Rep. 824.

62 EVIDENCE—Advancements. — On an issue as to whether money given by a parent to a child was an advancement, declarations by the parent made after the gift are not competent.—Hill's Guardian v. Hill, Ky., 92 S. W. Rep. 924.

63. EVIDENCE—Hearsay.—Where a contract appointing plaintiff defendant's exclusive broker was extended by a written indorsement, evidence as to a conversation between defendant and witness relating to defendant's understanding of the extension held inadmissible.—Clark v. Dalziel, Cal., 84 Pac. Rep. 429.

64. EVIDENCE—Prima Facie.—*Prima facie* evidence is such as in the judgment of the law is sufficient to establish the fact, and if unrebutted is sufficient.—Thomas v. Williamson, Fla., 40 So. Rep. 831.

65. FALSE PRETENSES—Lack of Diligence on Part of Prosecution —On a prosecution for obtaining money under false pretenses, the fact that the prosecutor with reasonable diligence could have ascertained the falsity of the representations, but failed to make any investigation, was no defense.—People v. Smith, Cal., 84 Pac. Rep. 449.

66. FEDERAL COURTS—Decisions of State Courts.—The statutes and decisions of the courts of last resort in a state where property mortgaged is situated, and where the controversy arose, are binding on the federal courts as a rule of property.—Haggart v. Wilczinski, U. S. C. C. of App., Fifth Circuit, 143 Fed. Rep. 22.

67. FORCIBLE ENTRY AND DETAINER—Scope of Action. —Forcible entry and detainer will not lie in favor of one forcibly excluded from the enjoyment of an easement.—Moye v. Thurber, Ala., 40 So. Rep. 822.

68. FORGERY—What Constitutes.—Comp. Laws 1897, § 1168, providing that every person who shall make, alter, or forge any public records, certificates, etc., shall be punished, relates to forgery, and has no application to a genuine certificate of acknowledgment, though the statements therein are untrue.—Territory v. Gutierrez, N. M., 84 Pac. Rep. 525.

69. GARNISHMENT—Right of Creditor.—A materialman furnishing materials to a subcontractor held not entitled to the money paid to the sheriff by the contractor, on being garnished, without first obtaining a judgment against the subcontractor.—Kruse v. Wilson, Cal., 84 Pac. Rep. 442

70. GUARDIAN AND WARD—Sale of Realty.—A guardian's deed will not be held void on collateral attack because the petition for leave to sell the ward's estate does not affirmatively show existence of conditions authorizing such sale.—Beachy v. Shomber, Kan., 84 Pac. Rep. 547.

71. HOMICIDE—Evidence.—Where the evidence is that a homicide was either murder in the first or second degree, or justifiable, it was error to submit by instructions the third degree to the jury —Territory v. Hendricks, N. M., 84 Pac. Rep. 528.

72. HOMICIDE—Insanity as a Defense.—Where, on trial for murder, defendant pleaded insanity, refusal to appoint a board of medical experts and allowing physicians suggested by accused to testify, who pronounced him sane, held not prejudicial to the accused.—State v. Douglas, La., 40 So. Rep. 860.

73. INDICTMENT AND INFORMATION - Allegations as to Time.—Charging that an offense was committed "on or about" a certain day is fatal on motion in arrest of judgment.—Morgan v. State, Fla., 40 So. Rep. 828.

74. INJUNCTION — County Commissioners. — Where a contract entered into by county commissioners was *ultra vires*, a permanent injunction was properly granted to enjoin the payment of the contract price.—Brown v. State, Kan., 84 Pac. Rep 549.

75. INTEREST—Absence of Special Demand.—Where interest is the legal consequence of the debt without express stipulation, it may be recovered, although the complaint does not contain a demand for interest.—City of Spokane v. Costello, Wash., 84 Pac. Rep. 652.

76. INTOXICATING LIQUORS—Duty Toward Patrons.—A saloon keeper held not bound to exercise the same degree of care for the protection of his patrons as is required of an innkeeper and a common carrier.—Peter Anderson & Co. v. Diaz, Ark., 92 S. W. Rep. 861.

77. INTOXICATING LIQUORS—Interstate Commerce.—An express company held guilty of violation of the prohibition law, though erroneously believing a transaction was interstate commerce.—Adams Express Co. v. Commonwealth, Ky., 92 S. W. Rep. 982.

78. INTOXICATING LIQUORS—Violation of Local Option Law.—In prosecution for violating the local option law, charge on the subject of sale held not full enough, and a requested special charge should have been given.—Lane v. State, Tex., 92 S. W. Rep. 889.

79. JUSTICES OF THE PEACE — Remittitur After Judgment.—Where the circuit court was without jurisdiction on appeal from a justice to entertain an amended complaint demanding damages in excess of the justice's jurisdiction, such defect could not be cured by a remit-

titur after judgment.—Rose v. Christinett, Ark., 92 S. W. Rep. 866.

80. LANDLORD AND TENANT—Adverse Possession by Tenant.—Limitations held not to run in favor of a tenant who purchased the land at tax sale against its landlord until notice to the latter of its repudiation of the tenancy.—Bryson & Hartgrove v. Boyce, Tex., 92 S. W. Rep. 820.

81. LANDLORD AND TENANT—Rights of Lessee.—That a tenant in possession had an option to purchase held no ground for denying the landlord the right to recover for permanent injury to the property caused by the negligence of a third person.—Hayden v. Consolidated Mining & Dredging Co., Cal., 84 Pac. Rep 422.

82. LANDLORD AND TENANT—Unlawful Detainer.—Where lessee refused to vacate premises after their sale in accordance with lease, action of unlawful detainer held properly brought by lessor for the use of the purchaser.—Cooper v. Gambill, Ala., 40 So. Rep. 827.

83. LIBEL AND SLANDER—Probable Cause for Statement.—Creditor of the firm held to have had probable cause for alleging that a third person had appropriated the assets of the firm to the detriment of its creditors, and brought about the bankruptcy of the firm.—Buford Bros. v. Southeimer, La., 40 So. Rep. 851.

84. LIS PENDENS—Purchasers Pendente Lite.—Purchasers of property in litigatation between the date of a judgment and the suing out of a writ of error within the time provided held purchasers *pendente lite*.—Bryson & Hartgrove v. Boyce, Tex., 92 S. W. Rep. 820.

85. MALICIOUS PROSECUTION—Advice of Counsel.—Defendants in an action for malicious prosecution are not protected by the advice of counsel, unless it be clearly shown that all the facts were laid before the counsel and that he actually gave the advice relied on.—King v. Erskins, La., 40 So. Rep. 844.

86. MANDAMUS—County Officers.—*Mandamus* will not lie to compel county officers to perform an act which they are not authorized to do by some plain provision of the law.—Territory v. Board of Supvrs. of Yavapai County, Ariz., 84 Pac. Rep. 519.

87. MARITIME LIENS—Life Preservers Furnished Vessel.—One who furnished life preservers for vessels in a New Jersey port in reliance on a statement by the owner that the vessels were sufficient security is entitled to a lien by contract and also under the New Jersey statute, which gives a lien for any equipment furnished a vessel under contract with the owner.—The Charles Spear, U. S. D. C., D. N. Y., 143 Fed. Rep. 185.

88. MASTER AND SERVANT—Assumed Risk.—A railroad conductor sent to haul certain derailed engines back onto the track held to assume whatever of added risk existed, obvious to him but unknown to his superior officer.—Illinois Cent. R. Co. v. Emerson, Miss., 40 So. Rep. 818.

89. MASTER AND SERVANT—Assumed Risk.—Servant held to assume risk of injury in sawmill where employer placed guards over machinery approved by experienced workmen.—Johnston v. Northern Lumber Co., Wash., 84 Pac. Rep. 627.

90. MASTER AND SERVANT—Contractor's Bond.—Bondsmen of a contractor for city water reservoir held not liable on a claim against a subcontractor for coal furnished for use in a steam engine.—City of Philadelphia v. Malone, Pa., 63 Atl. Rep. 539.

91. MASTER AND SERVANT—Defective Appliances.—A laundry employee, who merely knew that the ironing machine she operated ran in a jerky, unsteady manner, did not, as a matter of law, assume the risk of injury arising from the machine suddenly starting forward.—Tuckett v. American Steam & Hand Laundry, Utah, 84 Pac. Rep. 500.

92. MASTER AND SERVANT—Fellow Servants.—A boy employed to do errands and other light work in the manufacture of firearms, and other servants of the manufacturer employed in testing rifles by firing, are fellow servants.—Church v. Winchester Repeating Arms Co., Conn., 63 Atl. Rep. 510.

93. MASTER AND SERVANT—Fellow Servants.—Plaintiff and D, who were fellow motormen, operating freight motor cars on defendant's railroads under running arrangements made by themselves, held fellow servants.—Grimm v. Olympia Light & Power Co., Wash., 84 Pac. Rep. 685.

94. MASTER AND SERVANT—Malicious Injury to Patron.—A saloon keeper held not liable for the malicious act of a bartender in assisting another in maliciously setting fire to the foot of a patron while sleeping in the saloon.—Peter Anderson & Co. v. Diaz, Ark., 92 S. W. Rep. 861.

95. MECHANICS' LIENS—Homestead.—Where no written contract therefor is entered into with a husband and wife by one furnishing materials for use on a homestead, as required by Wilson's Rev. & Ann. St. 1903, § 2988, no lien attaches by the filing of a mechanic's lien.—Rowley v. Varnum, Okla., 84 Pac. Rep. 487.

96. MORTGAGES—Ejectment.—A mortgagee of property located in Mississippi, on breach of condition, may maintain ejectment to recover the mortgaged land as a means of enforcing the security.—Haggart v. Wilczinski, U. S. C. C. of App., Fifth Circuit, 143 Fed. Rep. 22.

97. MORTGAGES—Foreclosure.—A suit to foreclose a mortgage may be brought against a grantee of the mortgaged premises without joining the mortgagor.—California Title Ins. & Trust Co. v. Muller, Cal., 84 Pac. Rep. 453.

98. MUNICIPAL CORPORATIONS—Construction of Sewers.—Though a city in the exercise of its governmental functions may construct sewers, it has no right to complete a sewer in such a manner that it will discharge near the property of a person the accumulated filth.—City of Madisonville v. Hardman, Ky., 92 S. W. Rep. 930.

99. NEGLIGENCE—Contributory Negligence.—Contributory negligence in order to preclude recovery must approximately contribute to or cause the injury.—Illinois Cent. R. Co. v. Bethea, Miss., 40 So. Rep. 813.

100. NEGLIGENCE—"Last Clear Chance."—In order to bring the doctrine of "last clear chance" into operation, defendant must have actual knowledge of the dangerous position of plaintiff.—Sauer v. Eagle Brewing Co., Cal., 84 Pac. Rep. 425.

101. OFFICERS—Appointment by Ballot.—Where the appointment of an officer is required to be made by ballot by a legislative body, the appointment does not become effective until the result of the ballot is ascertained and made known.—State v. Starr, Conn., 63 Atl. Rep. 512.

102 PLEADINGS—Demurrer.—A judgment for defendant on demurrer is a final determination of the action, and until it is set aside no proceeding can be had therein, looking to a trial of the issues.—Martindale v. Battey, Kan., 84 Pac. Rep. 527.

103. PLEADINGS—Motion to Strike.—A motion to strike out a pleading is not an appropriate method of testing its sufficiency.—Grand Lodge I. O. O. F. v. Troutman, Kan., 84 Pac. Rep. 567.

104. PRINCIPAL AND AGENT—Apparent Authority.—Where, in an action by the original payee against the makers of a note given, the defendants showed payment to an authorized agent of plaintiff, a verdict for defendants will not be disturbed on appeal.—International Harvester Co. v. Smith, Fla., 40 So. Rep. 840.

105. PRINCIPAL AND SURETY—Failure to Rely on Primary Fund.—Failure of a city to retain moneys on a contract for a street improvement held no bar to a recovery against the surety on the bond of the contractor after payment by the city of a judgment for injuries from failure to guard an excavation.—City of Spokane v. Costello, Wash., 84 Pac. Rep. 652.

106. PRINCIPAL AND SURETY—Parties.—The estate of a surety is not a necessary party to an action by the administratrix of a co-surety to recover from the principal a sum paid by such administratrix in discharge of the debt.—Townsend v. Sullivan, Cal., 84 Pac. Rep. 435.

107. PUBLIC LANDS—Homestead.—A person cannot sell the land which he holds under the homestead law before

he has obtained a final receiver's receipt. — Wood v. Noel, La., 40 So. Rep. 857.

108 PUBLIC LANDS—Town Sites.—Under Rev. St. U. S. § 2387 [U. S. Comp. St. 1901, p. 1457], conveyance of town site land by county judge to person who never occupied the same held to confer no title.—Roberts v. Ward, Cal , 84 Pac. Rep. 430.

109 PUBLIC OFFICE—Appeal.—Neither the importance of the office nor the amount of public funds administered can be considered in determining the appellate jurisdiction over a suit between contestants for a public office.—State v. Dallas, La., 40 So. Rep. 847.

110. RAILROADS—Duty Toward Trespassing Children. —Employees in a railroad yard held bound to use ordinary care to prevent injuring the boys riding on the trains there.—Davis v. St. Louis, Southwestern Ry. Co. of Texas, Tex., 92 S. W. Rep. 831.

111. RAILROADS—Exemplary Damages — A railroad company cannot be held liable in punitive damages for the willful and wanton act of a conductor in wrongfully ejecting a trespasser from one of its moving trains in a dangerous place, causing his injury, where the company neither authorized nor ratified the act.—Toledo, St. L. & W. R. Co. v. Gordon, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 95.

112 RAILROADS—Injury from Dislodged Brake Shoe.— Where a licensee walking near a railroad track was struck and injured by a brake shoe which flew from a passing train, the railroad company was guilty of no negligence.—Carr v. Missouri Pac. Ry. Co., Mo., 92 S. W. Rep. 874.

113. RAILROADS—Negligence.—Negligence of the operators of the train in running it at a high rate of speed without signals over a crossing held to have been the proximate cause of the accident.—Illinois Cent. R. Co. v. Bethea, Miss., 40 So. Rep. 813.

114. RAPE—Prior and Subsequent Lascivious Conduct. —In a prosecution for rape, acts of prior and subsequent lascivious conduct and sexual intercourse held admissible to prove the adulterous disposition of the parties. —People v. Morris, Cal., 84 Pac. Rep. 463.

115. RELEASE—Rescission.—Where, in an action for injuries, the defense was a release, and the replication attacked it for fraud, it was necessary for plaintiff to tender the amount paid him with his replication.—Memphis St. Ry. Co. v. Giardino, Tenn , 92 S. W. Rep. 855.

116. REMOVAL OF CAUSES—Citizenship.—Joinder of a citizen defendant against whom no cause of action is alleged is no obstacle to a removal of the cause to the federal courts by a noncitizen defendant —Eastin & Knox v. Texas & P. Ry. Co., Tex., 92 S. W. Rep. 838.

117. REPLEVIN—Judgment.—A seller entitled to a judgment in replevin for the return of goods sold held required to repay freight charges for transportting the same to the place of delivery. — Kulzer v. Simonton, Wash., 84 Pac. Rep. 582.

118 SHIPPING—Damage to Cargo.—Damage to a shipment of arsenic on a voyage from leakage of olive oil stowed in the same hold held not due to improper stowage, but to perils of the sea, which did not render the vessel liable therefor.—The Langfond, U. S. D. C., S. D. N. Y., 143 Fed. Rep. 150.

119. SPECIFIC PERFORMANCE — Parol Agreement.—In an action to enforce a parol agreement, of a father to convey land to his son, an instruction that it was sufficient if plaintiff proved that "under such contract he was placed in possession of the real estate" held erroneous.—Baldwin v. Baldwin, Kan., 84 Pac. Rep. 568.

120. STREET RAILROADS—Killing Animals.—Where, in an action against a street railroad company for the killing of a hog, it appeared that the hog was outside of the stock limit, it was not contributory negligence for it to be running at large.—Little Rock Ry. & Electric Co. v. Newman, Ark., 92 S. W. Rep. 864.

121. TAXATION—Collection of Delinquent Taxes.—It is competent for the legislature to change the method of collecting delinquent taxes, and of imposing the costs of collection, and a city by proceeding under such an act waives any rights acquired by any previous sale for taxes under previous laws. — City of Orlando v. Giles, Fla., 40 So. Rep. 834.

122. TRIAL—Nonsuit —A nonsuit on the ground of the insufficiency of the evidence is properly denied where there is substantial evidence on which a jury can find a verdict for plaintiff —McCowan v. Northeastern Siberian Co., Wash., 84 Pac. Rep. 614.

123. TROVER AND CONVERSION—Evidence.—On an issue as to whether a decedent had held a sum of money as trustee for plaintiff, evidence considered, and held insufficient to show such to have been the case.—Austin v. Wilcoxson, Cal., 84 Pac. Rep. 417.

124. TRUSTS—Following Trust Funds. — When trust funds of a personal character have been changed into real estate, they can be followed, and the rights of the *cestui que* trust can be maintained, if the rights of third parties have not intervened.—Camden Land Co. v. Lewis, Me., 63 Atl. Rep. 523.

125. VAGRANCY—Sufficiency of Complaint.—In a complaint for vagrancy, under an ordinance denouncing as vagrants all persons who live by gambling, it is immaterial whether any game is specified, or what game it is. —City of Shreveport v. Bowen, La., 40 So. Rep. 859.

126. WAREHOUSEMAN—Warehouse Receipts.—Whether an instrument constitues a valid and negotiable warehouse receipt such that its transfer operates as delivery is to be determined by the law of the state. — Security Warehousing Co. v. Hand, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 32.

127. WILLS—Construction.—Where testator provided that a farm should not be sold during the lifetime of his daughters, without their consent, nor unless necessary to pay debts, the word "nor" was used in the sense of "or."—Reed v. Longstreet, N J., 63 Atl. Rep. 500.

128. WILLS—Estates for Life.—A devise of lands to A on condition that he shall not incumber it, nor have the power to sell it, but shall have the power to devise it, shows an intent to convey only an estate for life.—Morris v. La Bel, N. J., 63 Atl. Rep. 501.

129. WATERS AND WATER COURSES—Public Water Supply.—A rule of a city owning its own waterworks, that if water charges are not paid the water shall be turned off and not connected again till the delinquent charge is paid, held void for unreasonableness.—Burke v. City of Water Valley, Miss., 40 So. Rep. 820.

130. WITNESSES—Corroboration.—In a prosecution for robbery in pursuance of a conspiracy, evidence that witness saw the conspirators together in the early part of December held admissible to corroborate the testimony of one of the conspirators.—People v. Zimmerman, Cal., 84 Pac. Rep. 446.

131. WITNESSES—Depositions.—Testimony of a party who has merely taken a deposition, but not introduced it, cannot be objected to as contradicting such witness.— King v. Phœnix Ins. Co., Mo., 92 S. W. Rep. 892.

132. WITNESSES—Husband and Wife.—In personal actions of the wife brought by the husband both husband and wife are competent witnesses, but in actions for personal injuries to the wife the testimony of the husband should be excluded.—Martin v. Derenbecker, La., 40 So. Rep. 849.

133 WITNESSES—Illegal Marriage.—Where a marriage was illegal, no matter how confidential the relationship between the parties, and however much the woman may have regarded the man as her husband, the state had a right, on a prosecution against him, to introduce her testimony against him.—Young v. State, Tex., 92 S. W. Rep. 841.

134 WITNESSES—Redirect Examination.—Prosecutrix, having been cross-examined as to her charging another than defendant with the offense, held properly permitted to state her reasons for so doing on redirect examination.—People v. Darr, Cal., 84 Pac. Rep. 457.